Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9421

WILLIAM PRENTIS TUCKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

WILLIAM PRENTIS TUCKER,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, WILLIAM PRENTIS TUCKER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on December 4, 1975.

OPINION BELOW

The judgment of the District Court was affirmed by the Court of Appeals for the Fifth Circuit in an opinion

rendered December 4, 1975. The judgment and opinion of the Court of Appeals is attached hereto as Appendix "A"; the judgment of the District is attached hereto as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the minimum due process requirements established in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* mandate the conducting of a preliminary probation revocation hearing prior to a final hearing to revoke probation?

2. Whether the minimum due process requirements established in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* permit a revocation of probation to be based on conduct which occurred prior to the commencement of the term of probation?

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §3653 of the Federal Probation Act provides, in part:

> At any time within the probation period, the probation officer may for cause arrest the

> probationer... At any time within the probation period ... the court for the district in which the probationer is being supervised ... may issue a warrant for his arrest for violation of probation occurring during the probation period... [T]he probationer shall be taken before the court... Thereupon the court may revoke the probation and require him to serve the sentence imposed...

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V: No person shall...be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

The Petitioner, WILLIAM PRENTIS TUCKER, was convicted in the United States District Court for the Middle District of Georgia, at Macon, of violating 18 U.S.C. Appendix §1202(a). He was sentenced to serve six months of a two year term of imprisonment, the balance of which term was suspended and the defendant was placed on probation for five years, probation to commence on the defendant's release from the six month sentence. (Appendix "C").

The sentence was stayed, in its entirety, pending appeal of the conviction and, on March 19, 1975, after appellate review, the Petitioner surrendered himself to begin service of the six month sentence previously imposed. On the date he surrendered to begin the sentence of imprisonment the Petitioner was apprised by the court of a petition to revoke his probation

which had been filed in District Court the previous day.

Both the court and the Government anticipated proceeding with a probation revocation hearing that day; but, as Petitioner expressed a desire to be represented by his attorney who was then out of state, the court ordered the matter continued, first to the following day, then, at the Government's request, two days to March 21, 1975.

On March 21, 1975, the court intended to proceed with a final revocation hearing but Petitioner demanded a preliminary, as well as a final, revocation hearing on the petition to revoke probation and requested a continuance of both hearings in order to prepare to meet the charges therein. The court, at the Government's suggestion, immediately commenced a preliminary revocation hearing, but discontinued the proceedings as Petitioner reiterated the objection that he had had insufficient notice to prepare for even a preliminary revocation hearing. The court indicated it would conduct a preliminary hearing only if done forthwith and would deem that hearing waived unless proceeded to directly. Petitioner declined to waive either his right to a preliminary revocation hearing or his right to sufficient notice to prepare for the hearing; and the court ordered the matter continued six days for a final revocation hearing only.

The petition to revoke probation charged TUCKER with having possessed and transported lottery tickets in violation of unspecified Georgia State laws on two occasions. The dates of occurrence of these incidents were prior to the commencement of the term of probation previously imposed. (Appendix "D").

At the hearing evidence was adduced to show that Petitioner, on several occasions, picked up materials

purported to be lottery paraphenalia at a rural trash dump. No expert testimony was presented to establish that the materials were in fact lottery tickets. Instead, the court took judicial notice of the testimony of an expert witness from an earlier and separate trial proceeding that the materials were in fact lottery paraphenalia.

The court found Petitioner to be in violation of probation, revoked the probation previously granted, and imposed a sentence of two years imprisonment. (Appendix "B").

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE DENIAL OF A PRELIMINARY PROBATION REVOCATION HEARING IS IN DIRECT CONFLICT WITH THE DUE PROCESS PRINCIPLES ENUNCIATED BY THIS COURT IN *MORRISSEY V. BREWER* AND *GAGNON V. SCARPELLI*.

This petitioner presents a significant question involving clarification of the due process principles enunciated by this court in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) in federal probation revocation proceedings.

In *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed. 2d 484 (1972) this Court established clearly and unequivocally that parolees are entitled to the benefit of fundamental principles of justice and fairness embodied

in the due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution. The Court articulated the "process that is due" parolees, as minimally including both "an inquiry . . . in the nature of a 'preliminary hearing to determine whether there is probable cause or reasonable ground to believe that the arrested parolee . . . committed acts that would constitute a violation of parole conditions.'" Id., 408 U.S. at 485, and a "[r]evocation [h]earing . . . [which] must lead to a final evaluation of any contested relevant facts . . . warrant[ing] revocation" Id., 408 U.S. at 487-489. Further, "[f]or *each* hearing the parolee is entitled to notice of the violations alleged and the evidence against him, opportunity to be heard in person and to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses," (emphasis added), Id., 408 U.S. at 491, Mr. Justice Brennan, concurring.

The following term, in *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656 (1973) this Court held these minimal due process requirements – of a preliminary hearing and a comprehensive final revocation hearing – equally applicable to probationers. Moreover, Mr. Justice Powell, speaking for the Court, left no doubt that a probationer is entitled to both hearings and "[a]t the preliminary hearing, a probationer. . . is entitled to notice of the alleged violations of probation. . ., an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decision-maker, and a written report of the hearing." Id., 411 U.S. at 786.

These constitutional requisites were not met in the instant case. The due process requirement of a

preliminary revocation hearing established in *Morrissey v. Brewer* and *Gagnon v. Scarpelli, supra*, does not hinge on the custodial status of the probationer. Although a preliminary revocation hearing serves to guard against the unnecessary incarceration of those conditionally at liberty, nowhere in the opinions is the right to such a hearing made dependent on either the custodial status of the parolee/probationer, or the existence or non-existence of independent bases for incarcerating the subject of the proceedings. Indeed, the petitioner in *Gagnon v. Scarpelli, supra*, was apprehended with another person in the course of committing a burglary and admitted his participation to the arresting police agency. Clearly, he could have been incarcerated on an independent burglary charge as well as for violating his probation; the Supreme Court nonetheless extended him the right to a preliminary, as well as a final, probation revocation hearing. Moreover, in speaking to the second issue raised in that case, the necessity of appointing counsel for indigents in revocation proceedings, the Court considered the situation where "the violation is a matter of public record," which would be the case where a probationer is convicted of a new and separate offense, without suggesting the deletion of the preliminary revocation hearing, *Gagnon v. Scarpelli, supra*, 411 U.S. at 790. Thus, the fact that the Petitioner surrendered to begin serving the six month sentence previously imposed should not operate to deprive him of the due process right to a preliminary probation revocation hearing.

Nor can the Petitioner be said to have waived the hearing because of his insistence on adequate notice to meet the charges. He was apprised of the petition to

revoke his probation barely two days before such time as the Court was willing to conduct a preliminary hearing. The petition to revoke probation charged ". . . violation[s] of the laws of the State of Georgia" but failed to indicate what particular laws, or what particular conditions of probation, he was alleged to have violated. If the Petitioner is entitled to "notice of the violations alleged and the evidence against him . . . *for each hearing*" (emphasis added), *Morrissey v. Brewer, supra,* 408 U.S. at 491, the hearing itself cannot reasonably be said to fulfill the notice requirement. If this Petitioner is entitled to ". . . be heard . . . , present witnesses and documentary evidence, and . . . confront and cross-examine adverse witnesses," Id., he must be given sufficient notice to effectuate these rights in order for them to be meaningful. The lack of sufficient notice of the charges and evidence against him prior to the conducting of a preliminary probation revocation hearing would have effectively precluded the Petitioner from presenting evidence in his own behalf. Similarly, the lack of sufficient notice would have precluded the Petitioner from effectively confronting and cross-examining adverse witnesses by denying him the opportunity to adequately prepare to do so. Thus, the Court's offer to conduct a hearing without sufficient notice presented a Hobson's choice between two equally undesirable evils–lack of a hearing or lack of notice, without which the hearing would be meaningless. As such, the Petitioner cannot be said to have "waived" the hearing as that term is traditionally applied to the giving up of constitutional rights, e.g., *Boykin v. Alabama,* 395 U.S. 238 (1969).

Further, the United States District Court for the Northern District of Georgia addressed itself to the

precise problem of sufficient notice in the sense of adequate time to prepare in *Brannum v. United States Board of Parole* , 361 F.Supp. 394 (1973). Therein the Court stated "[w]hether the failure . . . to give the petitioner more than one day's notice prior to his hearing is inconsistent with the due process standard recognized in *Morrissey* must depend, of course, upon the prejudice, if any, to the parolee's defense. *Where a parolee is surprised by a notice of his preliminary or final revocation hearing and is unprepared to defend against the charges . . . contained in such notice, it would be clear that the due process standard of Morrissey had not been observed*" (emphasis added), Id., 361 F. Supp. at 397.

In the instant case the Petitioner was offered a preliminary hearing only under circumstances which precluded the effective assertion of the due process rights mandated by *Morrissey* and its progeny. The Petitioner was both surprised by the charges and, at the time the Court was willing to conduct a preliminary revocation hearing, unprepared to defend against them. A preliminary hearing as was offered—without prior notice of the adverse witnesses or other evidence to be presented, without prior notice of the particular Georgia state laws or probationary conditions alleged to have been violated and without sufficient notice to enable one to prepare both to meet the charges and to derive all the benefits of the hearing—cannot be said to comport with the standards enunciated by this Court in *Morrissey*. Thus, the failure to conduct a preliminary revocation hearing in this case worked a denial of fundamental principles of justice and fairness guaranteed under the due process clause of the Fifth Amendment to the United States Constitution.

For these reasons, the order and judgment of the Court of Appeals for the Fifth Circuit was in error and should be reversed.

II.

THE DECISION OF THE COURT OF APPEALS UPHOLDING A REVOCATION OF PROBATION BASED UPON CONDUCT OCCURRING PRIOR TO THE COMMENCEMENT OF THE TERM OF PROBATION IS INCONSISTENT WITH THE STANDARDS OF DUE PROCESS ESTABLISHED BY THIS COURT IN *MORRISSEY V. BREWER* AND *GAGNON V. SCARPELLI.*

This Petition presents a significant question concerning the application of the due process principles established in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) as regards revocation of probation for conduct occurring prior to the commencement of the probationary period.

The Petitioner was originally sentenced in District Court, on April 22, 1974, to ". . . imprisonment for a period of TWO (2) YEARS . . . defendant shall serve SIX (6) MONTHS of said sentence, . . . execution of the balance of the . . . sentence is . . . suspended and the defendant is placed on probation for a period of FIVE (5) YEARS, . . . service of . . . probation . . . is to begin when defendant is released from the service of the SIX (6) MONTH sentence" (Appendix "C"). By the language of the judgment, Petitioner's probation was not to begin until completion of the six month prison

term. This language clearly and unambiguously sets the duration and time of commencement of the probationary period. Further, by allowing the Petitioner to remain at liberty on bail pending review of the conviction, and by operation of Rule 38(a)(2) and (4), Federal Rules of Criminal Procedure[1] in conjunction with Rule 9(b), Federal Rules of Appellate Procedure,[2] both the term of imprisonment and the period of probation were stayed until final resolution of the appeals. Since the acts alleged to have constituted the violation of probation occurred prior to the service of the prison sentence, they necessarily occurred prior to the term of probation as imposed by the sentencing court. Assuming, *arguendo*, the acts alleged in the petition sufficiently evidenced a violation of pro-

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[1] Rule 38 provides in part:

Stay of Execution, and Relief Pending Review
(a) Stay of execution

* * *

(2) *Imprisonment.* A sentence of imprisonment *shall* be stayed if an appeal is taken and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. (emphasis added)

* * *

(4) *Probation.* An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court *shall specify when the term of probation shall commence.* If the order is stayed, the court shall fix the terms of the stay. (emphasis added)

[2] Rule 9 provides in part:

(b) *Release Pending Appeal from a Judgment of Conviction.* Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court . . . imposes conditions of release, the court shall state in writing the reasons for the action taken . . .

bationary terms and conditions, such acts, on the face of the petition, did not occur within the probationary period.

The general statutory authority for granting probation to persons convicted of federal offenses, as well as revoking such probation, is contained in Rule 32(e) and (f), Federal Rules of Criminal Procedure[3] and that portions of the Federal Probation Act reflected in 18 U.S.C. § 3651.[4] However, 18 U.S.C. § 3653, also a part

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[3] Rule 32 provides in part:

* * *

(e) *Probation.* After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

(f) *Revocation of Probation.* The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

[4] Section 3651 provides in part:

§ 3651. *Suspension of sentence and probation.* Upon entering a judgment of conviction . . . , any court having jurisdiction . . . when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best . . . [I]f the maximum punishment provided . . . is more than six months, [the court] may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution . . . for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms as the court deems best.

* * *

The court may revoke or modify any condition of probation, or may change the period of probation.

of the Federal Probation Act, expressly and specifically limits the court's power in such proceedings, permitting revocation only "for violation[s] of probation occurring *during the probationary period.*"[5] (emphasis added).

Hence, the language of the judgment here imposed, when considered in light of the limits on revocation powers expressed in 18 U.S.C. § 3653, precludes consideration of the conduct charged as a basis for revoking Petitioner's probation as the acts occurred outside the scope of the probationary period. Absent this conduct, the record is devoid of a factual basis supportive of a finding of violation and, therefore, the order of the Court below revoking probation was necessarily an abuse of discretion.

Moreover, decisions of the Court of Appeals in *United States v. Ross* (5th Cir. 1974), 503 F.2d 920, and *Cline v. United States* (5th Cir. 1940) 116 F.2d 275 do not require a contrary result. Both *Ross* and *Cline* involved factual situations wherein probation had been granted as a result of a misrepresentation by the defendant to the sentencing court. In *Cline* the defendant was discovered to be in possession of narcotics while awaiting transportation to prison on the

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[5] Section 3653 provides in part:

> At any time *within the probation period*, the probation officer may for cause arrest the probationer . . . At any time *within the probation period* . . . the court for the district in which the probationer is being supervised . . . may issue a warrant for his arrest *for violation of probation occurring during the probation period* . . .
> . . . [T]he probationer shall be taken before the court . . . Thereupon the Court may revoke the probation and require him to serve the sentence imposed . . . (emphasis added)

same day probation had been granted. In *Ross* the defendant was arrested for narcotic charges, and subsequently pleaded guilty, the very day he had been granted probation on a conviction for federal narcotic violations. Unquestionably, both defendants were granted probation as a result of misrepresentation to the Court at the time of sentencing. Other cases upholding revocation of probation prior to commencement of the probationary period, e.g., *United States ex rel Sole v. Rundle* (3rd Cir. 1971) 435 F.2d 721, and *Longknife v. United States* (9th Cir. 1967) 381 F.2d 17, involved similar misrepresentations to the sentencing court.

Here, the Court by its own statement was aware of Petitioner's involvement in lottery activities at the time probation was originally granted. Thus, probation was granted under no misrepresentation to the sentencing court and the rule in *Ross* would appear inapplicable. Moreover, as indicated by Judge Lynne in his concurring opinion in *Ross, supra,* 503 F.2d at 930, this Court has eliminated the "act of grace" classification of probationers, *Gagnon v. Scarpelli, supra,* 411 U.S. at 782, n.4. Thus, the conditional liberty afforded probationers must now be viewed as a right which cannot be withdrawn without due process of law, Id. These principles would appear to discredit pre-*Morrissey* decisions upholding revocations on virtually any factual basis which incurs the court's disfavor.

To accord probationers the benefit of the language of 18 U.S.C. § 3653, requiring violations to be based on conduct occurring "within the probation period," does not leave sentencing courts without supervisory powers in situations such as obtain here. A sentencing court may impose a term of probation to begin on

completion of a prison sentence under 18 U.S.C. § 3651. Where the defendant appeals the conviction, the court, in its discretion, may stay either or both the imprisonment and probation aspects of the sentence pending review under Rule 38(a)(2) and (4), Federal Rules of Criminal Procedure, see n.1, *supra.* Moreover, if the term of probation is stayed pending review, the court may, under Rule 9(b) and (c), Federal Rules of Appellate Procedure, and by reference therein, under 18 U.S.C. § 3148, impose specific conditions on the Defendant's release pending review. These alternatives reflect a drastic departure from Rule 38 prior to its amendment in 1972, which made the stay of both imprisonment and probation aspects of sentences mandatory pending review. The Rule was amended to make such stays discretionary for the precise reasons of maintaining supervisory powers over individuals granted probation who seek review of their convictions, as well as to enable defendants to benefit from the rehabilitative qualities of probation during the often lengthy appellate process.[6]

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[6] Thus, the Advisory Committee on Rules states:

"Having the defendant on probation during the period of appeal may serve the objectives of both community protection and defendant rehabilitation. In current practice, the order of probation is sometimes stayed for an appeal period as long as two years. In a situation where the appeal is unsuccessful, the defendant must start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection. The purposes of probation are more likely to be served if the judge can exercise discretion, in appropriate cases, to require the defendant to be under probation during the period of appeal. The American Bar

ED THROUGH

If the defendant violates conditions of probation, where probation is not stayed pending review, his probation may properly be revoked since the conduct constituting the violation would have occurred "within the probation period" as per the requirements of 18 U.S.C. § 3653. If the defendant engages in unseemly conduct where probation is stayed and conditions of release are imposed in lieu thereof, the defendant's bail may be revoked and he may be incarcerated pending resolution of the appeal; if unsuccessful in that endeavor, he would then be released on probation pursuant to the original judgment in the case. Indeed, these alternatives would seem to reflect the very outcome contemplated by the 1972 Amendment to Rule 38, making the stay of probation discretionary.[7]

Association Project on Standards for Criminal Justice takes the position that prompt imposition of sentence aids in the rehabilitation of defendants, ABA Standards Relating to Pleas of Guilty § 1.-8(a)(i), Commentary p.40 (Approved Draft 1968). See also Sutherland and Cressey, Principles of Criminology 336 (1966), "Notes of the Advisory Committee on Rules, 18 U.S.C.A. Federal Rules of Criminal Procedure, Rule 38, 1975 Supplement.

[7] Thus, the Advisory Committee on Rules comments:

"Under 18 U.S.C. § 3148 the court now has discretion to impose conditions of release which are necessary to protect the community against danger from the defendant. This is in contrast to release prior to conviction, where the only appropriate criterion is insuring the appearance of the defendant. 18 U.S.C. § 3146. Because the court may impose conditions of release to insure community protection, it seems appropriate to enable the court to do so by ordering the defendant to submit to probation supervision during the period of appeal, thus giving the probation service responsibility for supervision.

A major difference between probation and release under 18 U.S.C. § 3148 exists if the defendant violates the

Thus, the court having exercised its discretion, in the instant case, to stay probation pending appellate review, the appropriate remedy, on proof that Petitioner engaged in conduct prohibited by conditions of his release, would have been to revoke bail and incarcerate him pending the final resolution of his appeal. Had the court wished to maintain supervisory control over Petitioner through the probation department, it could have done so by declining to stay probation pending review of the conviction. Having made the choice as to means of supervision, the court, thereby, limited its remedy.

For the above stated reasons, it is respectfully submitted that the Court of Appeals, in upholding the revocation of probation based upon conduct occurring prior to the commencement of the probationary period, and absent a showing of misrepresentation to the court at the time probation was granted, worked a denial of due process of law in derogation of this Petitioner's constitutional rights.

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conditions imposed upon his release. In the event that release is under 18 U.S.C. § 3148, the violation of the condition may result in his being placed in custody pending the decision on appeal. If the appeal were unsuccessful, the order placing him on probation presumably would become effective at that time, and he would then be released under probation supervision. If the defendant were placed on probation, his violation of a condition could result in the imposition of a jail or prison sentence. If the appeal were unsuccessful, the jail or prison sentence would continue to be served," Notes of Advisory Committee on Rules, n.6, supra.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this ____ day of January, 1976, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Prentis TUCKER,
Defendant-Appellant.
No. 75-1997
Summary Calendar*.
United States Court of Appeals,
Fifth Circuit.
Dec. 4, 1975.

Defendant appealed from an order of the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., J., which revoked his probation. The Court of Appeals held that where the probationer was incarcerated pursuant to a final conviction at the time of attempted probation revocation, there was no requirement that there be a preliminary as well as a final probation revocation hearing.

Affirmed.

Appeal from the United States District Court for the Middle District of Georgia.

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

Affirmed.

Appellant Tucker was convicted of knowingly receiving a firearm in interstate commerce after having suffered previous felony convictions, in violation of 18 U.S.C. App. § 1202(a). He was sentenced to two years

imprisonment and ordered to serve six months, the balance of the sentence to be suspended. Tucker was also placed on probation for a period of five years. The judgment was affirmed on direct appeal by this court. *United States v. Tucker*, 502 F.2d 944 (5th Cir. 1974).

The sentence was stayed pending appeal, and on March 19, 1975, appellant surrendered himself to begin serving the six month term of imprisonment. At that time, he was apprised of a petition by the Government to revoke his not-yet-commenced probation because of alleged lottery activities during the pendency of his appeal. On March 21, the district court intended to hold a final revocation hearing on the petition; counsel for Tucker, however, demanded both a preliminary and a final hearing on the basis of the Supreme Court decisions in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The district court rejected this contention and only a final revocation hearing was held on March 27, 1975.

[1] We uphold the district court's ruling. The Supreme Court in *Morrissey* and *Gagnon* relied on the fact that revocation of parole or probation in the normal case operates to deprive the person affected of "many of the core values of unqualified liberty" and "inflicts a 'grievous loss' on the parolee [or probationer] and often on others." 408 U.S. at 482, 92 S.Ct. at 2601. That is, in the typical case of revocation of probation or parole, the probationer or parolee has been released from incarceration and is at liberty when the revocation proceeding begins. Accordingly, revocation of his probation or parole does deprive him immediately of his liberty. It was this deprivation which prompted the Court to determine that a preliminary as

well as a final revocation hearing was required to afford the petitioner due process of law.

[2] Where the probationer or parolee is incarcerated pursuant to a final conviction at the time of attempted revocation, as was Tucker, this rationale does not apply. In such a case, there is no immediate loss of freedom which would require the immediate probable cause hearing which the *Morrissey* and *Gagnon* Courts deemed necessary. The fact that this type of situation was not mentioned in either case does not compel a contrary conclusion; in neither case was the petitioner incarcerated subject to a final conviction at the time of attempted revocation.

[3] Appellant's contention that his probation could not be revoked before it had commenced is foreclosed by our decision in *United States v. Ross*, 503 F.2d 940 (5th Cir. 1974).

[4] After review of the record, we have determined that the evidence was sufficient to support a finding of violation of the terms and conditions of probation on Tucker's part.

Accordingly, the judgment is

Affirmed.

[11]

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

FILED at 5:00 P M

MAR 27 1975

Deputy Clerk, U. S. District Court
MIDDLE DISTRICT OF GEORGIA

UNITED STATES OF AMERICA	:	
	:	
VS	:	CRIMINAL NO. 74-34-MAC
	:	
WILLIAM PRENTIS TUCKER	:	

ORDER REVOKING PROBATION

The within petition for revocation of probation coming on for a hearing, and the Court having heard the testimony of witnesses and argument of counsel,

ORDERED that the probation sentence heretofore imposed by the Court upon defendant on April 22, 1974, be and the same hereby is REVOKED AND VACATED.

This March 27, 1975.

Wilbur D. Owens, Jr.
U. S. District Judge

United States of America vs.

United States District Court for

DEFENDANT: WILLIAM PRENTIS TUCKER — THE MIDDLE DISTRICT OF GEORGIA

DOCKET NO.: CR-74-34-MAC

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH March DAY 27, YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[ ] WITH COUNSEL Oscar B. Goodman, Las Vegas, Nevada - employed
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/~~conviction~~:
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY

Defendant has been convicted as charged of the offense(s) of 18 USC Appendix 1202(a) - Receiving in commerce a firearm after having been convicted of a felony.

and upon revocation of probation,

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO (2) YEARS, or until he is otherwise discharged as provided by law.

This sentence stands independently of any other sentence imposed by this Court in any other case and it is to be served prior to the commencement of any other sentence imposed by this Court.

FILED at 5:00 P.— M

MAR 28 1975

Dorothy J. Motte
Deputy Clerk, U. S. District Court
MIDDLE DISTRICT OF GEORGIA

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Wilbur D. Owens, Jr.

DATE March 27, 1975

12

2b

3b

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JUDGMENT AND COMMITMENT (Rev. 12-66) Cr. Form No. 25

United States District Court
FOR THE
MIDDLE DISTRICT OF GEORGIA - MACON DIVISION

D-1

United States of America

v. No. 74-34-MAC

WILLIAM PRENTIS TUCKER

APPENDIX C 1c

On this **22nd** day of **April**, 19 **74** came the attorney for the government and the defendant appeared in person and [1]

By Counsel - Employed

IT IS ADJUDGED that the defendant upon his plea of [2] **not guilty and a finding of guilty**
has been convicted of the offense of **receiving in commerce a firearm after having been convicted of a felony, in violation of 18 USC Appendix 1202(a);**

as charged [3] **in Count 1;**
and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4]
TWO (2) YEARS, or until he is otherwise discharged as provided by law; ORDERED FURTHER that defendant shall serve SIX (6) MONTHS of said sentence, and that execution of the balance of the within sentence is hereby suspended and the defendant is placed on probation for a period of FIVE (5) YEARS, and service of said probation sentence is to begin when defendant is released from the service of the SIX (6) MONTH sentence.

2c

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant

At Macon, Georgia

United States District Judge

The Court recommends commitment to: [5]

Clerk

[1] Insert "by [Name] of counsel, counsel" or "without counsel, the court advised the defendant of his rights to counsel and asked" him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived "the right to the assistance of counsel." [2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ". If required. [4] Enter (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence, (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

BLEED THROUGH

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APPENDIX D 1d

Probation Form No. 12
(Revised 6-6-45)

United States District Court

FOR THE

Middle District of Georgia

FILED at 5:00 P.M.

MAR 18 1975

Clerk, U. S. District Court

THE UNITED STATES

vs.

William Prentis Tucker

Division Macon

Docket No. C- 74-34-MAC

COMES NOW John T. Edge, Supervising U.S. PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer William Prentis Tucker who was placed on probation by the Honorable Wilbur D. Owens, Jr., sitting in the court at Macon, Ga., on the 22nd day of April 19 74 who fixed the period of probation supervision at five (5) years, and imposed the general terms and conditions of probation theretofore adopted by the court and also imposed special conditions and terms as follows:

Custody Attorney-General for two (2) years...to serve 6 months... execution of balance of sentence suspended...probation to begin when defendant released from six-month sentence.

RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS: (If short insert here; if lengthy write on separate sheet and attach)

On or about February 14, 1975, in Crawford County, Georgia, William Prentis Tucker possessed and transported lottery tickets in violation of the laws of the State of Georgia.

On or about February 25, 1975, in Crawford County, Georgia, William Prentis Tucker possessed and transported lottery tickets in violation of the laws of the State of Georgia.

2d

PRAYING THAT THE COURT WILL ORDER that a bench warrant issue for the arrest of said probationer, William Prentis Tucker; that he be brought forthwith before this Court to show cause why his probation should not be revoked; that the facts herein alleged be inquired of; and that upon the facts being proved, said probation sentence be revoked and sentence be imposed upon the said William Prentis Tucker.

ORDER OF COURT

Considered and ordered this 18th day of March, 1975 and ordered filed and made a part of the records in the above case.

U.S. District Judge

Respectfully,

John T. Edge, Sup. U.S. Probation Officer

Place Macon, Ga.

Date 3/18/75

3-18-75 - Probation Revocation Warrant of Arrest Issued.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-942

WILLIAM PRENTIS TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) he was entitled to both a preliminary and a final hearing before his probation could be revoked, despite the fact that he was in custody at the time that the government began revocation proceedings, and (2) his probation revocation was improperly based on conduct occurring after sentencing but before the probationary term had commenced.

Following a non-jury trial in the United States District Court for the Middle District of Georgia,

petitioner, a convicted felon, was found guilty of receiving a firearm in interstate commerce, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to two years' imprisonment, with all but six months suspended, and five years' probation. The court of appeals affirmed (502 F.2d 944), and this Court denied certiorari, 420 U.S. 946.

On March 19, 1975, petitioner surrendered himself to begin serving his six-month prison sentence.[1] He was then advised that the government had petitioned to revoke his probation because of gambling activities he had engaged in during the pendency of his appeal. After a brief non-evidentiary hearing on March 21,[2] the court set March 27 as the date for a formal probation revocation hearing (March 21 Tr. 19-20).

At the revocation hearing, the government presented the testimony of four United States Treasury agents and a Macon, Georgia, police officer, who identified petitioner as the person who in February 1975

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[1] Petitioner had been free on bail pending appeal.

[2] Although the government was prepared to proceed with a formal revocation hearing on March 21, petitioner sought a continuance, to be followed by a preliminary hearing to determine whether there was probable cause to believe that he had violated the terms of his probation (March 21 Tr. 1-3). The court denied petitioner's request for both a preliminary and a formal hearing, holding that such a procedure was unnecessary since petitioner was already lawfully incarcerated as a result of a conviction. However, the court offered to allow the government to present its evidence at the March 21 hearing and then to permit petitioner to cross-examine, introduce evidence, and argue the merits at a later date. Petitioner declined this invitation (March 21 Tr. 10-15).

had retrieved lottery materials from a "pick-up" point as part of an illegal gambling operation (March 27 Tr. 3-6, 7-11, 14-20, 21-22, 23-33). The court thereupon revoked petitioner's probation and reinstituted the portion of his sentence that had previously been suspended (March 27 Tr. 62-63).[3] The court of appeals affirmed (Pet. App. A).

1. Relying on *Gagnon* v. *Scarpelli*, 411 U.S. 778, and *Morrissey* v. *Brewer*, 408 U.S. 471, petitioner contends (Pet. 5-10) that, in addition to holding a formal revocation hearing, the district court was required to hold a preliminary hearing to determine whether there was probable cause to believe that he had violated his probation. The court of appeals correctly rejected this claim since, as this Court recognized in *Morrissey*, "not all situations calling for procedural safeguards call for the same kind of procedure." 408 U.S. at 481. The rationale underlying the dual hearing procedure mandated in *Gagnon* and *Morrissey* was that a defendant released on parole or probation should not be subject to arrest and detention pending a formal revocation hearing without a judicial determination that there was sufficient reason to deprive him of his conditional liberty. Thus,

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[3] Petitioner's claim (Pet. 14) that the court knew of his lottery activities at the time that the period of probation was imposed is belied by the record. Petitioner was sentenced on April 22, 1974, but the lottery activities that precipitated the revocation of his probation did not occur until February 1975 (Pet. App. D). Although the district court was aware that petitioner had been involved in gambling activities in the past, the court obviously did not expect that petitioner would resume his illicit activities following sentencing.

the Court required a preliminary hearing when a parolee (or probationer) was arrested for a parole (or probation) violation because

> the parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society * * *. * * * [H]is condition is very different from that of confinement in a prison.

Morrissey v. *Brewer*, *supra*, 408 U.S. at 482.

By contrast, petitioner was already lawfully incarcerated at the inception of the probation revocation proceedings, so he would have been afforded no additional protection from a preliminary hearing to determine whether there was probable cause to warrant his detention for the violation of probation.[4] He did not stand to lose his "conditional liberty" or otherwise "to suffer grievous loss." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 480, 481. Nor did petitioner face either "a substantial time lag between the arrest and the eventual [revocation] determination" or an arrest "at a place distant from the state institution, to which [a probationer] may be returned before the final [revocation decision]." *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 485. Thus, petitioner's rights were

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[4] The preliminary hearing under *Morrissey* and *Gagnon* is analogous to an initial appearance before a magistrate to determine probable cause following a warrantless arrest. Rule 5, Fed. R. Crim. P. Rule 5 is inapplicable if the defendant is already in custody pursuant to an unrelated conviction. *United States* v. *Smith*, 464 F.2d 194, 196-197 (C.A. 10), certiorari denied, 409 U.S. 1066; *United States* v. *Reid*, 437 F.2d 1166 (C.A. 7).

fully safeguarded by the formal revocation hearing that the district court expeditiously conducted. See *United States* v. *Strada*, 503 F.2d 1081, 1084 (C.A. 8).

2. Petitioner further contends (Pet. 10-17) that his illegal lottery operations were not conducted "within the probation period", 18 U.S.C. 3653, and hence cannot form the basis for the revocation of his probation. This claim was recently rejected in *United States* v. *Ross*, 503 F.2d 940 (C.A. 5), on facts essentially identical to those presented here. In *Ross*, the defendant had been sentenced to three years' imprisonment, with all but four months of the term suspended, and was placed on probation for five years. The court briefly stayed execution of the sentence to allow the defendant to arrange his business affairs. During the stay, Ross was arrested for possession of narcotics and, as a result, his probation was revoked. Finding the revocation of probation to be a proper exercise of the district court's discretion, the Fifth Circuit held (503 F.2d at 943):

> Sound policy requires that courts should be able to revoke probation for a defendant's offense committed before the sentence commences; an immediate return to criminal activity is more reprehensible than one which occurs at a later date.[5]

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[5] The propriety of a revocation based on criminal conduct occurring before commencement of the probation period was recognized in *Cline* v. *United States*, 116 F.2d 275 (C.C.A. 5), where the district court revoked the probation of a prisoner who was discovered to be in possession of narcotics while

Moreover, the broad power of the district court to "revoke or modify any condition of probation" derives from the unqualified language of 18 U.S.C. 3651, rather than from 18 U.S.C. 3653, upon which petitioner relies. Section 3653 merely details the procedures by which, "[a]t any time within the probation period, the probation officer may for cause arrest the probationer" and empowers the district court to "issue a warrant for [the probationer's] arrest for violation of probation occurring during the probation period." [6] This language cannot reasonably be construed to limit the broad grant of authority to the court in Section 3651 to revoke or modify the period or conditions of probation and to impose probation only "when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." See *United States* v. *Ross*, *supra*, 503 F.2d at 943.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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awaiting transportation to prison. See also *United States ex rel. Sole* v. *Rundle*, 435 F.2d 721 (C.A. 3), and *Longknife* v. *United States*, 381 F.2d 17 (C.A. 9), certiorari denied, 390 U.S. 926, in which probation was revoked before the probation period had commenced because of misrepresentations made by the defendant to the court during the sentencing proceeding.

[6] Petitioner was never arrested for a violation of probation.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1976 202649 222